



COMMONWEALTH of VIRGINIA

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December 27, 2004

Mr. David L. Morris II, AICP
Natural Resources Manager, Waterworks
City of Newport News, Department of Public Utilities
700 Town Center Drive
Newport News, Virginia 23606

RE: Federal Consistency Certification Conditional Concurrence of the Proposed King
William Reservoir Project: DEQ-04-176F

Dear Mr. Morris:

The Commonwealth of Virginia has completed its review of the consistency certification for the above referenced project. The Department of Environmental Quality (DEQ) is responsible for coordinating Virginia's review of federal consistency certifications submitted pursuant to the Coastal Zone Management Act of 1972, as amended (CZMA). Pursuant to the CZMA, federal actions that can have foreseeable effects on Virginia's coastal uses or resources must be conducted in a manner which is consistent with the Virginia Coastal Resources Management Program (VCP). The VCP is comprised of a network of enforceable policies administered by several agencies. Accordingly, DEQ, as the lead agency for the VCP, coordinated the review with agencies administering the enforceable and advisory policies. The City of Newport News submitted an update to its April 16, 1999, Consistency Certification for the referenced project on September 15, 2004. This update listed and explained numerous changes to the project that have occurred since 1999 with respect to the "Description of the Proposed Activity and Associated Facilities" and "Assessment of Probable Effects" sections of the Certification.

The updated Consistency Certification for the referenced project has been reviewed by the following agencies and/or offices (starred offices (*) administer Enforceable Policies of the VCP):

Department of Environmental Quality:
Division of Air Programs Coordination*
Division of Water Quality*

Piedmont Regional Office*
Department of Game and Inland Fisheries*
Department of Agriculture and Consumer Services
Department of Conservation and Recreation*
 Division of Chesapeake Bay Local Assistance*
 Division of Soil and Water Conservation*
 Division of Natural Heritage
Department of Health*
Marine Resources Commission*
Department of Historic Resources
Virginia Institute of Marine Science (advisor to Marine Resources Commission)
Department of Forestry
Hampton Roads Planning District Commission
King William County
King and Queen County.

In addition, the Department of Transportation and the Middle Peninsula Planning District Commission were invited to comment.

PROJECT DESCRIPTION

According to the federal consistency certification update received on September 17, 2004, the City of Newport News (City), on behalf of the Regional Raw Water Study Group (RRWSG), is applying to construct an impoundment covering 1,526 acres formed by a new dam on Cohoke Creek, a tributary of the Pamunkey River located between the Pamunkey and Mattaponi Rivers in King William County. (The Regional Raw Water Study Group is an unincorporated association comprising the Cities of Newport News and Williamsburg, and the County of York.) The City proposes to withdraw a maximum of 75 million gallons of water a day from the Mattaponi River through an intake structure in that River and a pump station at Scotland Landing, 24 river miles upstream from the mouth of the River.

This water would be pumped through a 54-inch pipeline 1.5 miles to the proposed reservoir from the River. A maximum of 50 million gallons a day would be pumped out of the proposed reservoir through a pipeline to Beaverdam Creek, a tributary of Diascund Creek Reservoir, in New Kent County. This pipeline would be 11.7 miles long and 42 or 48 inches, depending on location, in diameter. The purpose of the proposed project is to meet public water supply needs of the Lower Peninsula area of Virginia through a 50-year planning period ending in 2040. The proposed project is one component of the RRWSG's overall plan to meet public water supply needs on the Lower Peninsula through 2040. The other components of the plan include: a combination of fresh groundwater development and/or groundwater desalination to augment existing supplies, new permanent water conservation measures to reduce long-term, year-round, demands, and additional water use restrictions to force reduction of public water demands during droughts. (Consistency Certification Update, Appendix with additional information, pages 1-2, item 1).

CONDITIONAL CONCURRENCE

The City has certified that "the proposed project will be conducted in accordance with all pertinent federal and State permits and other authorizations including applicable enforceable

regulatory programs of the Virginia Coastal Resources Management Program.” Based on the comments submitted by the agencies administering the enforceable policies of the VCP, we concur that this proposal is consistent with the VCP **provided** that the City obtains all approvals not yet secured that are applicable to the enforceable policies, adheres to all the conditions of the Virginia Water Protection Permit (VWPP #93-0902), adheres to all conditions of the Virginia Marine Resources Commission Permit (VMRC #93-0902), and is consistent with the Coastal Lands Management Enforceable Policy, including the Department of Conservation and Recreation’s Division of Chesapeake Bay Local Assistance’s conditions pertaining to the placement of non-water-dependent aspects of the project outside of Resource Protection Areas (RPAs). For convenience, the conditions associated with the Subaqueous Lands Management and the Wetlands Management Enforceable Policies of the VCP are listed in Appendix 1.

The conditions associated with Point Source Pollution Control, Non-point Source Pollution Control, and Coastal Lands Management enforceable policies of the VCP are listed and discussed later in this letter.

In accordance with 15 CFR Part 930, §930.4, this conditional concurrence is based on the City complying with all conditions as stipulated in all permits and authorizations associated with enforceable policies of the VCP. If the requirements of paragraphs (a)(1) through (3) of 15 CFR Part 930, §930.4 are not met, this conditional concurrence becomes an objection under 15 CFR Part 930, §930.63. Should this conditional concurrence become an objection based on the City’s failure to comply with the applicable enforceable policies, pursuant to 15 CFR Part 930, Subpart H, the City may request that the Secretary of Commerce override this objection (see 15 CFR Part 930, §930.63(e)).

The North Atlantic Division of the US Army Corps of Engineers, in its January 31, 2003, letter to Newport News (see enclosed letter from Thomas M. Creamer to R. W. Hildebrandt), has indicated that “Any special conditions the Commonwealth places on its concurrence must be factored into the Corps of Engineers’ decision making. The conditions would also become special conditions of a Department of the Army Permit, if issued.”

In accordance with 15 CFR Part 930, Section 930.66, federally permitted activities previously determined to be consistent with the VCP, but which have not yet begun, require further coordination by the applicant if the proposed activity will affect any coastal use or resource in a substantially different way than originally described. Substantially different coastal effects are reasonably foreseeable if the applicant makes substantial changes in the proposed activity that are relevant to VCP enforceable policies, or if there are significant new circumstances or information relevant to the proposed activity and the effects of that activity on any coastal use or resource. In the event that the proposed activity affects any coastal use or resource in a substantially different way than originally described, the City must notify DEQ through a supplemental consistency certification.

PUBLIC PARTICIPATION

In accordance with 15 CFR §930.61, DEQ invited public participation in its review of the federal consistency certification for the King William Reservoir. In this regard, DEQ conducted a public hearing on October 20, 2004, and accepted written public comments. The public comment period ended on October 29, 2004. More than 2,980 responses were submitted.

The following organizations found the project to be consistent with the VCP: Virginia Peninsula Chamber of Commerce, Williamsburg Chamber of Commerce, and Peninsula Citizens for Fair Play on Water.

The following organizations found the project to be inconsistent with the VCP: Mattaponi Indian Tribe, Chesapeake Bay Foundation, Sierra Club, Virginia Forest Watch, Georgetown University Law Center, Southern Environmental Law Center, Mattaponi and Pamunkey Rivers Association, Wetlands Watch, Alliance to Save the Mattaponi, and 11 Watermen's Associations. In addition, the Honorable Jo Ann Davis (Member of Congress, First District, Virginia) and the Honorable Harvey P. Morgan (Delegate, Virginia General Assembly, District 98) each expressed their belief that the project should be found inconsistent with the VCP.

In summary, the majority of the public comments received state that the proposed project currently under review is inconsistent with the following Enforceable Policies of the VCP: Fisheries Management; Subaqueous Lands Management; Wetlands Management; Non-point Source Pollution Control; and Coastal Lands Management. In addition, a number of public comments indicate that the following Advisory Policies relative to Coastal Natural Resources Areas would be adversely affected: wetlands; aquatic spawning, nursery, and feeding grounds; significant wildlife habitat areas; and underwater historic sites.

Due to the volume of information provided by the public, the need for a careful analysis thereof, and in order to facilitate a timely review by agencies, DEQ summarized the major comments which represented the views of numerous individuals and several organizations and asked agencies to analyze the issues raised by the public. We included copies of detailed public comments for reviewers' use in addressing the issues raised. In a December 2, 2004, memorandum to agencies, we asked questions relating the issues raised to applicable enforceable policies and, in the cases of MRC and DEQ's Water Division, to applicable permits as well. However, we indicated that the questions were intended to facilitate, but not to limit, reviewers' analyses of the issues raised in the public comments. A summary of the issues raised during the public comment period and any additional responses provided by agencies administering the applicable enforceable and advisory policies of the VCP are enclosed as Appendix 2.

It is important to note that the majority of the topics and issues identified in the correspondence and testimony submitted during the public comment period are governed by one or more of the permits or approvals already obtained by the City for the referenced project. For example, we received extensive comments related to the potential wetlands impacts of the referenced project and the mitigation requirements and plans associated with those impacts.

The framework of the Virginia Coastal Resources Management Program is such that the issuance of the state permits and approvals associated with the Enforceable Policies of this Program constitutes a project's consistency with those Policies. Once a state permit or approval is issued pursuant to one or more of the VCP's Enforceable Policies for a project, and for as long as the project remains in compliance with the provisions therein, the project is deemed to be consistent with the VCP. After further review of the topics and issues raised during the comment period, none of the agencies that administer the Enforceable Policies of the VCP objected to the City's consistency certification for the project.

This does not mean, however, that the topics and issues raised during the public comment period will go unaddressed due to the fact several state permits and approvals have already been issued for the referenced project. Instead, these concerns will be taken into consideration when the City submits for approval the outstanding information required by provisions of the permits and approvals. These provisions are discussed later for each applicable Enforceable Policy of the VCP. Of particular interest to many of the persons that submitted comments about the wetlands mitigation plan, the Virginia Water Protection Permit (VWPP #93-0902; issued for the project in 1997) contains requirements for a public notice of the final plan, a public hearing, and consideration of public comments.

APPLICABLE ENFORCEABLE POLICIES OF THE VCP

The discussions which follow present state agencies' comments and conclusions with regard to each of the applicable Enforceable Policies of the VCP, along with conditions and stipulations stemming from the Enforceable Policies.

1. Subaqueous Lands Management Enforceable Policy

This policy is administered by the Marine Resources Commission (Commission.) The Marine Resources Commission advised that it has reviewed an amended permit application, submitted by the City on April 1, 2004, pursuant to a settlement agreement between the City and the Commission. The litigation was initiated by the City of Newport News following the Commission's decision to deny the application to construct the following components of the project:

- a raw water intake structure at Scotland Landing in the Mattaponi River
- a raw water distribution line under Cohoke Creek in King William County and the Pamunkey River between King William and New Kent Counties; and
- a water discharge structure in Beaverdam Creek, a tributary to Diascund Reservoir in New Kent County.

The reservoir dam on Cohoke Creek in King William County is authorized by statute (*Virginia Code* section 28-2-1203) and does not require a permit from the Commission.

Following the settlement of the litigation, the City amended its previous permit application to the Commission. The changes involved operation of the intake structure to address effects on anadromous fish spawning through the establishment of a pumping hiatus (i.e., a seasonal shut-down of water withdrawals) using temperature as a trigger, based on the results of a proposed long-term (8 years) pre-operational ichthyoplankton monitoring program. The City described the pumping hiatus and monitoring program in detail in its Fisheries Panel Report. The permit application amendment also described proposed construction details, including the use of a sheet-pile baffle structure and turbidity curtain during installation of the intake screens. In addition, prior to the supplemental hearing that was held on August 11 and 12, 2004, the City proposed various stipulations and special conditions to address the pumping hiatus, the monitoring program, and other issues including spoil disposal and intake screen material.

The Commission voted to approve the permit application at the end of the hearing, with stipulations and conditions that are associated with the Subaqueous Lands Management Enforceable Policy of the VCP. The conditions for VMRC Permit #93-0902 are listed in Appendix 1. The issuance of this permit constitutes consistency with this Enforceable Policy and MRC did not state any objection to the referenced project.

2. Fisheries Management Enforceable Policy

This policy is administered by the Department of Game and Inland Fisheries (DGIF) and the Marine Resources Commission. The VMRC Permit #93-0902 approved on August 12, 2004, contains conditions which address fisheries management. DGIF states that it supports the conditions of the Marine Resources Commission as stated in the Commission's August 17, 2004, letter to the City. See item 1, above.

DGIF requests that all monitoring reports, with regard to both pre- and post-construction phases of the proposed project, be provided to DGIF for review and concurrence. DGIF also understands that a time-of-year restriction will be implemented for all in-stream work during construction of the raw water intakes associated with the project; this restriction will apply from February 15 through June 30 of each year.

According to DGIF, the City proposes to cooperate with DGIF in planning for restoration of anadromous fish passage to at least one (1) currently blocked tributary stream in the York River basin. DGIF supports this proposal and looks forward to the opportunity to review the anadromous fish passage restoration plan. DGIF did not state any objection to the referenced project.

3. Wetlands Management Enforceable Policy

This policy is administered by DEQ's Division of Water Quality and the Marine Resources Commission. The tidal wetlands permitting program administered by the Marine Resources Commission is not at issue in the case of this proposed project because the project does not affect tidal wetlands.

DEQ's Division of Water Quality protects non-tidal wetlands through the Virginia Water Protection Permit. The State Water Control Board approved a Virginia Water Protection Permit (VWPP #93-0902) for the proposed project on December 22, 1997. The permit was subsequently modified on December 22, 2002. This permit expires on December 22, 2007. DEQ's Water Division states that changes to the project have not altered its previous determination that issuance of the permit makes the project consistent with the Wetlands Management Enforceable Policy of the VCP. DEQ's Water Division also stated that the changes have also not necessitated a re-evaluation of the 1997 VWP Permit at this time. According to the terms of the existing VWP permit, reapplication must be made no less than 180 days prior to the expiration date. If a reapplication is submitted, there will be ample opportunity for public comment and consideration of all relevant information before any decision regarding reissuance of a permit is made.

There are a number provisions of 1997 VWP Permit (VWPP# 93-0902M) associated with the Wetlands Management Enforceable Policy that require certain additional plans to be submitted by the City. The City must satisfy these permit conditions in order for the project to remain consistent with the VCP. These conditions are listed in Appendix 1.

4. Non-Point Source Pollution Control Enforceable Policy

This enforceable policy is administered by the Department of Conservation and Recreation, Division of Soil and Water Conservation. According to the Department of Conservation and Recreation (DCR), any land disturbance exceeding an area of 2,500 square feet must comply with the Virginia Erosion and Sediment Control Law, which requires that the applicant prepare and submit an Erosion and Sediment Control Plan to DCR's York-Rappahannock Watershed Office (P.O. Box 1425, Tappahannock, 22560). Questions should be addressed to that Office (telephone (804) 443-6752).

A related requirement for a Stormwater Management Plan applies to the project. Depending on local requirements, the City of Newport News must prepare one or more Stormwater Management Plans pursuant to the Virginia Stormwater Management Law (*Virginia Code* sections 10.1-603.1 *et seq.*), and submit it to the appropriate locality, depending on the part of the project involved. As with the Erosion and Sediment Control Plan, an approved Plan is required before any regulated activities may begin at the project site. The Stormwater Management Plan must cover all regulated activities at the site. These include: on- or off-site access roads, staging areas, and spoil or borrow areas.

DCR's Division of Soil and Water Conservation recommends that this project be considered in conjunction with any other existing or proposed land use conversion or expansion plans for the property in order to adequately address the cumulative impacts upon the receiving drainage, as well as to identify appropriate strategies for reducing the non-point source pollution from the developed and developing areas of the site. Questions may be addressed to DCR's York-Rappahannock Watershed Office (Matt Criblez, telephone (804) 443-6752). DCR did not state any objections to the referenced project. (Please also see Appendix 2 "Summary of Comments Received" for additional comments submitted by DCR regarding this enforceable policy.)

5. Coastal Lands Management Enforceable Policy

This enforceable policy is administered by the Department of Conservation and Recreation's Division of Chesapeake Bay Local Assistance (DCR-DCBLA). According to DCR-DCBLA, at this point, it is not possible to determine if the King William Reservoir complies with **all** of the Bay Act requirements, given that it is in the permitting phase of the project and that actual site plans, water quality impact assessments and other plans and local permits have not yet been developed or submitted. King William County has ultimate approval authority over the reservoir, but the Chesapeake Bay Local Assistance Board is charged with ensuring that the County enforces and implements its local Chesapeake Bay Preservation Act program consistent with the Act and Regulations (see Section 10.1-2103.10 of the Act). Therefore, as the reservoir moves through the various review phases, the staff of DCR-DCBLA, as staff to the Local Assistance Board, will continue to monitor the project for compliance with the Act, the Regulations, and King William County's local Bay Act requirements.

(a) *The Reservoir.* According to the Department of Conservation and Recreation (DCR), the proposed reservoir will cause the loss of approximately 403 acres of vegetated wetlands and 21 linear miles of streambed. Nearly all of the wetlands and a substantial portion of the stream buffers

that would be affected by the reservoir are Chesapeake Bay Resource Protection Areas (RPAs). DCR's Division of Chesapeake Bay Local Assistance indicates that the proposed reservoir would be a water-dependent use pursuant to the Chesapeake Bay Preservation Area Designation and Management Regulations (9 VAC 10-20-10 et seq.). While the reservoir would cause the loss of a considerable area of RPA features and buffers, the new reservoir and wetland areas around its fringes would need to be delineated and RPA buffers identified along the entire perimeter. These new RPAs would become subject to the Development Criteria for RPAs in accordance with the Regulations and the King William County Zoning Ordinance (Chesapeake Bay Preservation Area Overlay District, Article III, Division 20). The Regulations, at 9 VAC 10-20-191A.4, require that the RPA and Resource Management Area (RMA) boundaries be shown on the plats, along with a requirement to retain an undisturbed, vegetated, 100-foot RPA buffer. Given this requirement, the RPA buffers and any expanded buffers should be maintained in a natural vegetative condition. Ideally, they should be planted with native trees and shrubs if they are not vegetated already. DCR's Division of Chesapeake Bay Local Assistance recommends use of the guidance manual, *Riparian Buffers Modification and Mitigation Guidance Manual* in establishing and maintaining vegetative buffers. The *Manual* is available from the Division (Alice Baird, telephone (804) 225-2307) or from DCR (Synthia Waymack, telephone (804) 786-4379).

While the development of the reservoir is allowed under the Chesapeake Bay Preservation Area Designation and Management Regulations, it still must conform to all applicable requirements of the Regulations and King William County's Bay Act program. The following is a list of the requirements that must be adhered to in order for the project to be consistent with the Act, Regulations, and King William County's local Bay Act program. Please note that the County has amended its Bay Act ordinance and is currently having it re-codified. Therefore, the specific reference numbers from the County ordinance noted below may change after re-codification.

i. A water quality impact assessment must be developed and submitted for the King William Reservoir. The water quality impact assessment must provide information on the impacts of the reservoir on water quality and lands in the RPA as well as determine specific measures for mitigation of those impacts (Section 9 VAC 10-20-130.1.a of the Regulations and Division 20, Section 20-11(A)1 of King William County's Bay Act ordinance).

ii. The site-specific boundaries of the RPA must be delineated onsite, including all water bodies with perennial flow. This is to be accomplished *prior* to approval of any plan of development, site plan, water quality impact assessment, etc (Section 9 VAC 10-20-130.1.a of the Regulations and Division 20, Section 20-11(A)1 of King William County's Bay Act ordinance).

iii. The following conditions must be met for the development of the reservoir to be permitted in the RPA as a water-dependent facility (Section 9 VAC 10-20-130.1.b of the Regulations and Subdivisions a.-c. of Division 20, Section 20-11(A)(2) of King William County's Bay Act ordinance):

- It does not conflict with King William County's comprehensive plan;
- It complies with the performance criteria: minimizing land disturbance and impervious coverage, preserving existing vegetation, adhering to erosion and sediment control and stormwater management requirements, obtaining all other state

and federal permits, and it must be approved through King William County's plan of development process, (which includes a site plan, land disturbing permit, erosion and sediment control plan, landscaping plan and stormwater management plan);

- Any non-water dependent component is located outside of RPAs; and
- Access to the water dependent facility will be provided with the minimum disturbance necessary. Where practicable, a single point of access will be provided.

(b) *Pipelines.* The proposed pipelines associated with the project are conditionally exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations, **provided** that the following conditions are met:

i) To the degree possible, the location of such facilities should be outside Resource Protection Areas;

ii) No more land shall be disturbed than is necessary to provide for the proposed utility installation;

iii) All construction, installation, and maintenance of such utilities and facilities must comply with all applicable state and federal permits, and designed and used in a manner that protects water quality; and

iv) Any land disturbance exceeding an area of 2,500 square feet must comply with the Virginia Erosion and Sediment Control Law (see also item 4, above).

(c) *Structures and Paved Areas.* Structures and paved areas associated with the project must comply with the Chesapeake Bay Preservation Area Designation and Management Regulations. This requires that all these facilities, with the possible exception of the pump stations, be placed outside of RPAs. If there is no clear water-dependent advantage for pump stations to be located in RPAs, then these, too, should be located landward of the RPA.

(d) *Other Facilities: Recreational Sites.* According to DCR's Division of Chesapeake Bay Local Assistance, the host agreement provides for King William County to develop as many as five recreational sites around the proposed reservoir. All non-water-dependent aspects of these sites should be situated outside the newly created RPAs.

It is the judgment of DCR's Division of Chesapeake Bay Local Assistance that the proposed project will be consistent with the Chesapeake Bay Preservation Area Designation and Management Regulations, and hence with the Coastal Lands Management Enforceable Policy, **provided** that the foregoing requirements and conditions are met. (Please also see Appendix 2 "Summary of Comments Received" for additional comments submitted by DCR regarding this enforceable policy.)

6. Air Pollution Control Enforceable Policy of the VCP

This policy is administered by the Department of Environmental Quality's Air Division.

(a) *Permitting Requirements.* Heating and other fuel-burning facilities may require permits from DEQ. Questions on these requirements may be addressed to DEQ's Piedmont Regional Office (James Kyle, Air Permits Manager, telephone (804) 527-5047).

(b) *Fugitive Dust Control.* During construction activities, fugitive dust must be kept to a minimum by using control methods outlined in 9 VAC 5-50-60 et seq. of the Regulations for the Control and Abatement of Air Pollution. These precautions include, but are not limited to, the following:

- Use, where possible, of water or chemicals for dust control;
- Installation and use of hoods, fans, and fabric filters to enclose and vent the handling of dusty materials;
- Covering of open equipment for conveying materials; and
- Prompt removal of spilled or tracked dirt or other materials from paved streets and removal of dried sediments resulting from soil erosion.

(c) *Open Burning Requirements.* In addition, if project activities include the burning of any material, this activity must meet the requirements of the Regulations for open burning (9 VAC 5-40-5600 et seq.), and it may require a permit (see item 6(a), above). The Regulations provide for, but do not require, the local adoption of a model ordinance concerning open burning. Newport News should contact appropriate local officials to determine what local requirements, if any, exist. The model ordinance includes, but is not limited to, the following provisions:

- All reasonable effort shall be made to minimize the amount of material burned, with the number and size of the debris piles;
- The material to be burned shall consist of brush, stumps and similar debris waste and clean-burning demolition material;
- The burning shall be at least 500 feet from any occupied building unless the occupants have given prior permission, other than a building located on the property on which the burning is conducted;
- The burning shall be conducted at the greatest distance practicable from highways and air fields;
- The burning shall be attended at all times and conducted to ensure the best possible combustion with a minimum of smoke being produced;
- The burning shall not be allowed to smolder beyond the minimum period of time necessary for the destruction of the materials; and
- The burning shall be conducted only when the prevailing winds are away from any city, town or built-up area.

DEQ's Air Division did not state any objections to the referenced project.

7. Shoreline Sanitation Enforceable Policy

According to the federal consistency certification update (Appendix, page 4), the City will apply for a license from the Health Department for a small septic system that serves the raw water

pumping station, which is part of the project. The Department of Health stated that it supports the proposed King William reservoir in general.

ADVISORY POLICIES OF THE VCP

The discussions which follow present state agencies' comments and recommendations with regard to each of the advisory policies of the VCP, issues raised by the public pertaining to these advisory policies and responses to these issues from agencies with jurisdiction on the appropriate policy.

Coastal Natural Resources Areas Advisory Policy

Public Recreation Areas are included in this advisory policy. The Mattaponi River, which is to be the source of water for the proposed project, has been found to qualify for designation as a state Scenic River. In addition, it is an existing blueways water trail, according to the Department of Conservation and Recreation. For these reasons, maintaining the water quality and the flow of the River is critical. The proposed water withdrawal must not adversely affect the recreational use of the River or prevent it from designation as a state Scenic River.

Comments were received with regard to two other areas included in this Advisory Policy: **Aquatic Spawning, Nursery, and Feeding Grounds**, and **Significant Wildlife Habitat Areas**.

The Department of Conservation and Recreation requested additional information from the City in order to comment on potential impacts to natural heritage resources from this project, because changes have been made in the project since the Department's earlier comments. "Natural heritage resources" are defined as the habitat of rare, threatened, or endangered plant and animal species, unique or exemplary natural communities, and significant geologic formations.

After completing its review of the additional information, DCR stated that there are occurrences of the federally listed sensitive joint vetch (*Aeschynomene virginica*) within the Garnetts Creek Conservation Site (Biodiversity Rank B3, indicating high significance), which is in the vicinity of and downstream of the proposed intake structure. The potential for erosion or accretion of Mattaponi marshes, and the potential for alteration of the salinity of the river as a result of the proposed intake structure may jeopardize the continued presence of this federally protected plant if significant changes occur in either of these features. For this reason, DCR restates the importance of a long-term monitoring program for sensitive joint-vetch in the Mattaponi tidal marshes. DCR stated it would like to review such a program to ensure its effectiveness.

In its December 10, 2004, comments, DCR stated that the agency had recently received shapefiles from the Newport News Waterworks and wished to review the project using the Virginia Conservation Lands Needs Assessment (VCLNA). The VCLNA is a GIS-based analysis for identifying and prioritizing conservation lands in Virginia. DCR submitted further comments about its review of the additional information for referenced project in a December 17, 2004, letter. This letter is enclosed.

DCR stated its analysis using the VCLNA makes it clear that the King William Reservoir project is likely to have a substantial impact on the fragmentation of significant wildlife habitats in the region. In particular, the reservoir will be a significant fragmentation feature for most interior

wildlife species. If the reservoir is constructed, we highly recommend that the protected buffer around the reservoir be maintained in a natural state and be extended to include the entire identified C3 core. This would serve as partial compensation for the habitat that will be flooded and will help to maintain high water quality in the reservoir.

DCR believes that the VCLNA Natural Landscape Assessment will be useful in assessing the relative merits of wetland mitigation sites. While DCR has not yet had the opportunity to review the proposed wetland mitigation plan, DCR notes that the extensive wetland loss that will result from creation of the King William Reservoir will require offset by a very large effective wetlands mitigation program.

DCR recommends that new surveys be conducted for the sensitive joint vetch and the small whorled pogonia (*Isotria medeoloides*) because significant time has passed since the original surveys were done. The surveys should be done for both the footprint of the project and the proposed mitigation sites as identified in the Malcome Pirnie, June 2004 King William Reservoir Project – Reservoir Mitigation Plan. These surveys should also include any possible mitigation sites proposed for the project (for example, small whorled pogonia populations at Chisel Run site in James City County, and other nearby extant small whorled pogonia sites, that DCR and the US Fish and Wildlife Service have suggested for preservation as mitigation for small whorled pogonia takings within the reservoir footprint).

Accordingly, judgment is reserved by DCR on the potential impacts to natural heritage resources from the project as presently configured and proposed. The City is advised to continue working with DCR staff on this matter.

The Department of Agriculture and Consumer Services, which has regulatory responsibility for protection of state-listed endangered or threatened plant and insect species, indicates that because of the proximity of such species and the changes in the project through an extended review process, revisiting the environmental review of the project may be in order. (For more information, contact Keith Tignor, Department of Agriculture & Consumer Services (804) 786-3515.)

Underwater Historic Sites is the final Advisory Policy of the VCP for which we received comments during this review. The Department of Historic Resources (DHR) has worked with the Army Corps of Engineers (both the Norfolk District and North Atlantic Division) for a number of years to assist the Corps in fulfilling its responsibilities under Section 106 of the National Historic Preservation Act.

According to the DHR (letter dated September 2, 2004 to the Corps North Atlantic Division, accompanying the Department's September 30 letter to this Office), the North Atlantic Division of the Corps determined that the issuance of a Department of the Army permit for the proposed reservoir would have an adverse effect on properties included in, or eligible for inclusion in, the National Register of Historic Places. For the purposes of the Section 106 review, it is appropriate to treat all of the 106 archaeological sites that will be affected by the construction of Dam Site IV (the proposed dam) as an eligible archaeological district. DHR stated its growing concern that in spite of the length of time the proposed reservoir has been under consideration, and notwithstanding the efforts of the North Atlantic Division to maintain consultation among the stakeholders on this project, no substantive mitigation of effects to areas of cultural and religious significance to the

Virginia Tribes has yet been agreed upon. DHR anticipates continued consultation with the Corps until all outstanding Section 106 issues pertaining to the proposed project are resolved.

OTHER MATTERS RELATED TO THIS CONSISTENCY CERTIFICATION REVIEW

1. Dam Construction Permit.

The City must apply to DCR's Division of Dam Safety for a dam construction permit. Questions may be addressed to the Division (telephone (804) 371-6095).

2. VPDES Stormwater General Permit.

The City must apply to DEQ for a Virginia Pollutant Discharge Elimination System (VPDES) Stormwater General Permit for Construction Activities for the referenced project.

3. Underground Storage Tanks.

According to DEQ's Piedmont Regional Office, the area proposed for flooding for the reservoir should be checked for several types of petroleum sources since the project will be used for drinking water. Residences and farms often use above-ground and underground tanks for heating and for fueling equipment. It is frequently found that residential and farm tanks are abandoned without being emptied. These tanks may contain gasoline or diesel fuel. Ideally, all above-ground and underground tanks in the area to be flooded should be removed. At a minimum, the tanks should have all fuel **and** sludge removed from them.

DEQ's Piedmont Regional Office reviewed its data base for King William County and found that there have been 91 reported releases from tanks, 30 of which are regulated (meaning the tank was located at commercial site, or was larger than 1000 gallons). This means an additional 61 residential or farm tanks have been identified as leaking to date. Since DEQ does not regulate heating oil tanks until they leak, it is difficult to know how many tanks may be present in the area of the proposed project's location. DEQ's Piedmont Regional Office recommends a survey of the area to address the petroleum sources that should be removed before the project proceeds. This survey should cover drums in sheds, tanks at all structures, and abandoned equipment.

4. Regional Comments.

The Hampton Roads Planning District Commission has reiterated its support for the proposed project at its October 20, 2004 quarterly meeting. The Commission coordinated its review of the federal consistency certification update with the sixteen localities in Hampton Roads through the Directors of Utilities Committee. The Commission finds the project to be consistent with local and regional plans and urges DEQ to find the project consistent with the VCP. The Commission bases this conclusion on exhaustive studies over the past fifteen years which show the project to be the most cost-effective and least environmentally damaging way to meet the public water supply needs of the Peninsula portion of the Hampton Roads region.

5. Local Comments.

King William County had no additional comments.

King and Queen County submitted comments on the project at DEQ's public hearing and by letter within the comment period established by DEQ. King and Queen County states that the project is inconsistent with the Enforceable Policies of the Virginia Coastal Program and also with sound environmental practices because it is likely to change water salinity in the Mattaponi River and flood approximately 420 acres of naturally occurring wetlands in neighboring King William County, which may impair wildlife habitat in the greater Middle Peninsula area.

The County also points out that it is an active member of the Middle Peninsula Chesapeake Bay Public Access Authority, which is working closely with DEQ's Coastal Program to protect water quality and increase public access to pristine waterways in the Middle Peninsula.

Thank you for the opportunity to review the federal consistency certification for the proposed King William Reservoir. If you have questions on these comments, please feel free to call Ellie Irons at (804) 698-4325 or Charles Ellis at (804) 698-4488.

Sincerely,

Michael P. Murphy, Director
Division of Environmental Enhancement

Enclosures

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